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No. 88-1088

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In the Supreme Court of the United States

OCTOBER TERM, 1988

WALLACE ROGERS, SOUTHEAST KANSAS COMMUNITY ACTION PROGRAM, INC., AND THE ECONOMIC OPPORTUNITY FOUNDATION, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Claims Court correctly dismissed petitioners' claims against the United States under the Fifth Amendment's guarantees of equal protection and due process and under Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d.

2. Whether the Federal Circuit correctly rejected on the merits petitioners' several challenges to the decision of the federal Community Services Administration—made in the course of winding up its affairs before the agency terminated its functions at the end of Federal Fiscal Year (FFY) 1981—not to fund the two petitioner community action agencies for the part of their 1981 program years that extended into FFY 1982.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	11
Conclusion	17
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Army & Air Force Exchange Service v. *Sheehan*, 456 U.S. 728 (1982)	12
Bowen v. *Gilliard*, 107 S. Ct. 3008 (1987)	14
Bowen v. *Massachusetts*, 108 S. Ct. 2722 (1988)	12, 16
Brown v. *GSA*, 425 U.S. 820 (1976)	13
Christianson v. *Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988)	16-17
Clark v. *Library of Congress*, 750 F.2d 89 (D.C. Cir. 1984)	12
Clemente v. *United States*, 766 F.2d 1358 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986)	12
Duarte v. *United States*, 532 F.2d 850 (2d Cir. 1976)	12-13
Dugan v. *Rank*, 372 U.S. 609 (1963)	6
Eastport S.S. Corp. v. *United States*, 372 F.2d 1002 (Ct. Cl. 1967)	12
Guardians Ass'n v. *Civil Service Comm'n*, 463 U.S. 582 (1983)	15
Jaffee v. *United States*, 663 F.2d 1226 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982)	12
Land v. *Dollar*, 330 U.S. 731 (1947)	6
Larson v. *Domestic & Foreign Corp.*, 337 U.S. 682 (1949)	6
Radin v. *United States*, 699 F.2d 681 (4th Cir. 1983)	12
Reeside v. *Walker*, 52 U.S. (11 How.) 272 (1850)	16
Richardson v. *Belcher*, 404 U.S. 78 (1971)	14
Soberal-Perez v. *Heckler*, 717 F.2d 36 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984)	14

Cases—Continued: Page

United States v. *Mitchell*, 463 U.S. 206 (1983) 12
United States v. *Testan*, 424 U.S. 392 (1976) 12
Zinger Constr. Co. v. *United States*, 753 F.2d 1053 (Fed. Cir. 1985) 16

Constitution, statutes and regulations:

U.S. Const.:
Art. 1, § 9, Cl. 7 16
Art. 2, § 3 5
Amend. V 7, 12, 14

Anti-Deficiency Act, 31 U.S.C. 1512(c)(1)(a) 3, 9

Civil Rights Act of 1964, 42 U.S.C. 2000a *et seq.*:
§ 601, 42 U.S.C. 2000d 10-11, 12, 13, 14, 15
§ 602, 42 U.S.C. 2000d-1 14
§ 717, 42 U.S.C. 2000e-16 13

Economic Opportunity Act of 1964, 42 U.S.C. 2701 *et seq.* (1976):
42 U.S.C. 2790(a) (1976) 2
42 U.S.C. 2808 (1976) 2
42 U.S.C. 2812(a) (1976) 4
42 U.S.C. 2833(b) (1976) 10
42 U.S.C. 2944 (1976) 10
42 U.S.C. 2944(2) (1976) 4
42 U.S.C. 2967 (1976) 4, 10
42 U.S.C. 2971(b) (1976) 9

Impoundment Control Act of 1974, 2 U.S.C. 681 *et seq.*... 5, 11

Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357 2

Rehabilitation Act of 1973, § 504, 29 U.S.C. 794 14

Tucker Act:
28 U.S.C. 1491 12
28 U.S.C. 1491(a)(1) 5

28 U.S.C. 1343 13

28 U.S.C. 1631 ..... 5, 16

Regulations—Continued: Page

45 C.F.R. (1980):
Pt. 1050:
Sections 1050.115-1 to 1050.115-8 10
Pt. 1067:
Subpt. 1067.2 4
Section 1067.2-4 4
Section 1067.30-5(8) 5, 10

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (Pet. App. A1-A2) is unreported. The opinion of the United States Claims Court (Pet. App. A3-A25) is reported at 14 Cl. Ct. 39. The opinion of the United States District Court for the District of Kansas dismissing petitioners' complaint (App., *infra*, 1a-17a) is unreported. The opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. A26-A39) ordering the case transferred to the Claims Court is reported at 766 F.2d 430.

JURISDICTION

The judgment of the Federal Circuit (Pet. App. A1) was entered on September 28, 1988. The petition for a writ of

certiorari was filed on December 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

As the successor to the Office of Economic Opportunity, the Community Services Administration (CSA) distributed funds to local community action agencies (CAAs) to serve low-income citizens. 42 U.S.C. 2790(a) (1976); Pet. App. A4, A27. On August 13, 1981, Congress enacted the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357, which, effective October 1, 1981, terminated CSA, repealed the statute (42 U.S.C. 2808 (1976)) under which funds for CAAs were appropriated, and substituted a program of block grants to States. Pet. App. A5, A28. Petitioners, two large CAAs and one of their low-income clients, challenge the manner in which CSA distributed funds in terminating its activities. *Id* at A3.

1. Many CAAs, including petitioners, were budgeted according to program years that did not coincide with federal fiscal years (FFY). In 1975, CSA adopted a plan for distributing funds that distinguished small CAAs (those receiving less than $300,000 annually) from large CAAs (those receiving more than that amount). Pet. App. A4, A27-A28. Small CAAs (by far the majority) received their funding in one yearly grant taken from one federal fiscal year's appropriations. Large CAAs, by contrast, generally were funded by two separate grants: one for the period from the beginning of the CAA's program year to September 30th (the end of the federal fiscal year); another that covered the period from October 1st (the beginning of the subsequent federal fiscal year) to the end of the CAA's program year. Pet. App. A4-A5, A28.[1]

[1] The plan was initially established to help provide funds for the large CAAs during and after a period of reduced CSA appropriations. Pet. App. A4-A5.

When Congress ended the program of grants to CAAs and substituted a block grant program in OBRA (Pet. App. A5, A28-A29),[2] CSA had six weeks in which to wind up its affairs. Rather than adopt a new fund-distribution method, CSA chose to maintain its established funding pattern during its waning days. Pet. App. A7, A29-A30; App., *infra,* 15a. CSA made that decision with the aim of achieving an equitable distribution of the remaining funds while minimizing disruption. App., *infra,* 15a.

Most small CAAs already had been funded for their full program years at the time Congress enacted OBRA. Pet. App. A29; App., *infra,* 14a. The few remaining small CAAs whose applications were pending on August 13, 1981, were given their full funding. Pet. App. A29-A30. The large CAAs also were funded according to the traditional pattern, but that meant less than full funding for many of them. *Id.* at A30. Such CAAs could be financed only to the extent that FFY 1981 appropriated funds existed. Fiscal year 1982 funds, which ordinarily would have been the source of large CAAs' second infusion of revenue, had not been appropriated for CSA. Moreover, FFY 1981 funds that remained after funding of the small CCAs were used to pay administrative expenses of closing the agency (*e.g.,* annual leave and termination benefits for CSA's employees) or set aside to provide for contingencies pursuant to the Anti-Deficiency Act, 31 U.S.C. 1512(c)(1)(a); some of this money then reverted to the United States Treasury on the final day of FFY 1981.

2. Petitioners filed this lawsuit in federal district court in Kansas on September 30, 1981, one day before the end

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[2] The State of Kansas, where the petitioner CAAs are located, elected to participate for FFY 1982. App., *infra,* 5a. Under the program, participating States had discretion to decide how to use federal antipoverty funds, including discretion to make grants to former CAAs. *Ibid.*

of FFY 1981. Pet. 14. They challenged the lack of funding on a variety of statutory and constitutional grounds. After denying requests for a temporary restraining order and preliminary injunction, the district court granted the government's motion to dismiss. *Ibid.*; App., *infra,* 4a. The court first held that petitioners' suit was premature because the CAAs at that time were eligible to receive money under the block grant program that replaced direct CSA funding. App., *infra,* 4a-5a. The court went on, however, to consider and to reject petitioners' claims on the merits.

The court concluded that CSA's manner of winding up violated neither 42 U.S.C. 2812(a) (1976), which set a funding minimum for each CAA, nor 42 U.S.C. 2967 (1976), which required disbursement of funds equitably between rural and urban areas. App., *infra,* 5a-6a. The court explained that those provisions were repealed effective the same date that CSA ceased funding the petitioner CAAs (October 1, 1981, the beginning of FFY 1982). *Ibid.* Similarly, the court ruled that, because the CSA program was abolished entirely, the statutory and regulatory requirements of notice and a hearing for denial of funding or suspension of funding *under the program* (42 U.S.C. 2944(2) (1976); 45 C.F.R. Subpt. 1067.2 (1980)) were not applicable to this case and hence were not violated; moreover, the regulations expressly excluded cases of reduced appropriations (45 C.F.R. 1067.2-4 (1980), an exclusion that covered complete elimination of appropriations. App., *infra,* 7a. The court concluded that, because petitioners had "no legitimate claim of entitlement to funds direct from the federal government during fiscal year 1982" in the absence of any appropriation of such funds to the CSA program (*id.* at 8a), petitioners likewise had no property interest, for procedural due process purposes, in receiving funds past the end of FFY 1981. *Id.* at 8a-9a.[3]

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[3] The next two contentions addressed and rejected in the court's opinion, but not raised in the petition for a writ of certiorari, were

Petitioners also contended that CSA's distribution violated a statutory requirement that funds be distributed equitably, deprived them of equal protection, and was arbitrary and capricious in violation of the Administrative Procedure Act (APA). App., *infra,* 11a. The court rejected all of those contentions, finding that, although a *pro rata* distribution among all CAAs might have been fairer (*id.* at 13a), the policy followed by CSA in its final days was entirely rational. The policy continued the funding scheme that had been in place since 1975, and the *pro rata* alternative would have required CSA to retrieve funds from the many small CAAs that had already been fully funded before the enactment of OBRA on August 13, 1981. *Id.* at 13a-16a.

3. On appeal, the Tenth Circuit held that the case fell within the Claims Court's exclusive jurisdiction and, without addressing the merits, therefore ordered the case transferred pursuant to 28 U.S.C. 1631. Pet. App. A26-A39. The court reasoned that the Claims Court had exclusive jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), if three conditions were met: "(1) the action is against the United States; (2) the action seeks monetary relief in excess of $10,000; and (3) the action is founded upon the Constitution, federal statute, executive regulation, or government contract." Pet. App. A33. The court of appeals found that all three conditions were met in this case.

The court explained that the complaint in fact sought money from the United States, although in form it sought only declaratory and injunctive relief—namely, a declara-

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that CSA's actions constituted an illegal impoundment of unexpended FFY 1981 funds, in violation of U.S. Const., Art. 2, § 3, and the Impoundment Control Act of 1974, 2 U.S.C. 681 *et seq.*, and violated the agency's regulation stating that "whenever possible the grantee's fundings will coincide with the grantee's program year" (45 C.F.R. 1067.30-5(8) (1980)). App., *infra,* 9a-11a.

tory judgment that CSA's funding decision was unlawful on various grounds, and an injunction requiring the defendant federal officials (the head of CSA and the head of the Office of Management and Budget) to pay to petitioner Southeast Kansas Community Action Program, Inc. (SEK-CAP), the balance (eight months' worth) of its program-year funds. Pet. App. A33-A34.[4] The amount requested was in excess of $200,000. *Id.* at A34. The court of appeals explained that, because the underlying purpose of the suit was to obtain more than $10,000 in money from the federal government, the Claims Court had exclusive jurisdiction under the Tucker Act, and that jurisdiction could not be avoided simply "by framing a complaint in the district court as one seeking injunctive, declaratory or mandatory relief." Pet. App. A34-A35. The court also observed that, "[a]lthough the United States was not a named party in this action, the effect of suing defendants in their official capacities while seeking monetary relief is to make the action one against the United States." Pet. App. A37 (citing *Dugan* v. *Rank,* 372 U.S. 609, 620 (1963); *Larson* v. *Domestic & Foreign Corp.,* 337 U.S. 682, 704 (1949); *Land* v. *Dollar,* 330 U.S. 731, 738 (1947)). Finally, the court determined that, in addition to the constitutional, statutory, and regulatory grounds, the action was based on a contract: it sought "funds for the remainder of SEK-CAP's 1981 program year on the basis of an alleged agreement that once its grant was approved and the $114,222 payment was made on June 1, such funds would be provided." Pet. App. A38-A39. Accordingly, there was exclusive Claims Court jurisdiction because the action was

[4] Petitioner Economic Opportunity Foundation (EOF), the second CAA plaintiff in the district court, was not a party to the appeal. Pet. App. A29 n.4. Petitioner Wallace Rogers was a low-income resident of Kansas served by SEK-CAP. *Id.* at A29.

"in essence against the United States," sought "monetary relief," and was based on an "alleged agreement" and on "other claims premised on constitutional, statutory and regulatory grounds." *Ibid.*

4. After the case was transferred and an amended complaint was filed against the United States by all three petitioners, the Claims Court granted the government's motion to dismiss and for summary judgment.[5] The court concluded that the failure to provide the two CAAs funding for the period after September 30, 1981, did not breach an implied-in-fact contract and was not arbitrary and capricious (Pet. App. A10-A18) and did not violate statutory and regulatory guarantees of fair procedure and equitable treatment (*id.* at A20-A21). The court also ruled that the remaining claims were outside its jurisdiction—the CAA petitioners' Fifth Amendment procedural due process and equal protection claims (Pet. App. A22-A23), and petitioner Rogers' statutory race discrimination claim (*id.* at A23-A24).

On the merits, the court began by explaining that the dispute came down to whether funds were available to pay the two CAAs for the part of their 1981 program years extending into FFY 1982. Pet. App. A11. Plainly no FFY 1982 funds were available, because CSA, which was terminated on October 1, 1981, received no FFY 1982 appropriations. *Id.* at A12. The court also concluded that there was no error in CSA's decision not to distribute to the petitioner CAAs any of the FFY 1981 funds remaining in the agency on August 13, 1981, the day the CSA-dismantling statute was enacted. With those funds, CSA decided, in

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[5] Although petitioner EOF had not appealed the final judgment entered against it by the district court in Kansas, the government did not object on res judicata grounds to EOF's renewing its claim in the Claims Court.

accord with its past practice, to continue to fund small CAAs for their full program years but to provide funding only up to September 30, 1981, for the large CAAs, expecting the FFY 1982 block grant funds to make up the balance of the large CAAs' program years. Pet. App. A12. After the re-funding of all small CAAs in petitioners' region, $1.4 million in unobligated funds remained. *Id.* at A13. Rather than distributing those funds to the large CAAs in the region, CSA decided, in late September 1981, to use the funds to cover expenses of terminating the agency and to serve, pursuant to the Anti-Deficiency Act, as a reserve to meet obligations of the agency that might come to light later. *Ibid.* On September 30, 1981, $8 million of CSA appropriations, the remainder of all funds held for close-out and Anti-Deficiency Act purposes, lapsed into the Treasury. *Ibid.*

The Claims Court held that CSA's decisions after August 13, 1981, regarding the distribution of the FEY 1981 funds had a rational basis and were not arbitrary or capricious or an abuse of discretion. First, continuing the small CAA/large CAA funding pattern was rational: CSA could not fully eliminate the distinction between small and large CAAs without retrieving already distributed funds; the existing pattern had been established since 1975; CSA reasonably anticipated that FFY 1982 block grant funds would fill the gap for large CAAs;[6] and CSA determined that there was insufficient time and money to develop a new funding pattern in the waning months of CSA's existence, without unduly interfering with the orderly close-out. Pet. App. A14-A15. Second, the transfer of certain funds to the contingency reserve was specifically author-

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[6] In fact, as petitioner SEK-CAP acknowledged in its brief in the Tenth Circuit (at 15), SEK-CAP did receive a block grant from the State of Kansas for FFY 1982.

ized by the Anti-Deficiency Act, 31 U.S.C. 1512(c)(1)(a), and the amount CSA set aside for that purpose was hardly excessive. Pet. App. A15-A16. Third, CSA acted reasonably in setting aside certain funds for administrative close-out costs; until October 1, 1981, the CSA director, who was concerned about the need to meet the agency's obligations to its employees, had solid grounds to believe that Congress would not appropriate any additional money to cover those costs. *Id.* at A16-A17. The court concluded: "Faced with limited time and money, CSA attempted to dole out its resources in such a way as to protect its employees and at the same time to fund as many CAAs as possible." *Id.* at A17. See also *id.* at A14 ("the evidence suggests that CSA made every effort to fund all CAAs to the maximum degree possible while at the same time attempting to attend to an orderly close-out").

The court similarly rejected the breach-of-contract claim that there were "available" FFY 1981 funds that had to be given to the petitioner CAAs: "The fact that for the past two years CSA had sufficient funds available to pay plaintiffs' second grants from * * * funds remaining from the preceding FFY, does not obligate CSA to do so in this case." Pet. App. A17-A18. Moreover, the distribution of FFY 1981 funds to small CAAs and the application of the remaining funds to termination expenses and to an Anti-Deficiency Act contingency reserve were "within CSA's discretion." Pet. App. A18. Hence, the court concluded: "At the close of FFY 1981, because of these obligations, there were not sufficient * * * funds available with which to fund [petitioners]." *Ibid.*[7]

[7] The Claims Court also rejected petitioners' contention, under 42 U.S.C. 2971b (1976) (requiring publication of all rules, regulations, guidelines, and application forms), that the "failure to publish specific guidelines in the Federal Register concerning the mechanics of the split funding policy" rendered it void in this case. Pet. App. A18-A19.

The Claims Court next rejected petitioners' claims of statutory and regulatory violations. First, the court held that CSA did not violate 42 U.S.C. 2944 (1976) and 45 C.F.R. 1050.115-1 to 1050.115-8 (1980), which required notice and an opportunity to be heard when re-funding was "denied" or when funding was "terminated." See Pet. App. A20. Petitioners conceded that re-funding had not been denied (*ibid.*); and the court explained that there had been no "termination of funding," because "[o]n the date the second grant payment was due * * *, CSA did not have any funds available," and hence "[t]he condition precedent to the [petitioners'] contract with CSA—the availability of funds—did not occur" (*ibid.*). Second, the court held that the statutory requirements of equitable distribution of funds between rural and urban areas, 42 U.S.C. 2967, 2833(b) (1976), were not violated. All CAAs received full funding during FFY 1981; and on the day that FFY 1982 began, the cited statutes were repealed. Pet. App. A21.[8]

The Claims Court then determined that it lacked jurisdiction under the Tucker Act over the petitioners' due process and equal protection claims and over petitioner Rogers' race discrimination claim under 42 U.S.C.

Although the court stated that "the details of the policy probably should have been published," it pointed out that "not only did [petitioners] have knowledge of a policy that had been going on for six years, but [they] * * * initially benefited from the policy." *Id.* at A19. The court also pointed out that, "[r]egardless, in this case, properly promulgated CSA regulations [45 C.F.R. 1067.30-5(8) (1980)], while expressing a preference for program year funding, effectively state[d] a policy that CSA funding might not coincide with the grantee's program year." Pet. App. A19.

[8] The court also rejected petitioners' argument that CSA violated the regulation directing that funding should coincide with program years "whenever possible." Pet. App. A21-A22. Petitioners do not renew that claim in this Court.

2000d. Pet. App. A22-A24. With respect to the constitutional claims, the court explained that since the Tucker Act is merely jurisdictional and does not grant substantive rights, it furnished jurisdiction only if the constitutional guarantees relied on by petitioners mandate monetary compensation. Pet. App. A22. The court found that it lacked jurisdiction over the procedural due process and equal protection claims because "these components of the Fifth Amendment standing alone do not mandate payment of monetary damages." Pet. App. A23. The court found that it lacked jurisdiction over petitioners Rogers' statutory claim of race discrimination for a different reason. The court stated that "[c]laims of racial discrimination based upon a statute may only be brought in a United States District Court." *Id.* at A23-A24.[9]

5. The Federal Circuit affirmed. Pet. App. A1-A2. It found that the Claims Court had convincingly explained that CSA, in "facing the uncommon requirement to permanently close itself down, had acted in all respects within its discretion and in accordance with law." *Id.* at A2. The court of appeals further ruled that the Claims Court "was also correct in its determination that it had no jurisdiction over the due process, equal protection, and discrimination claims." *Ibid.*

ARGUMENT

1. Petitioners challenge the Claims Court's holding that it lacked jurisdiction over petitioners' equal protection, due process, and 42 U.S.C. 2000d claims. Whatever

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[9] Finally, the Claims Court rejected petitioners' claim that CSA's failure to expend its entire FFY 1981 appropriation, and its allowing of $8 million to revert to the Treasury, violated the Impoundment Control Act of 1974, 2 U.S.C. 681 *et seq.* Pet. App. A24. Petitioners do not raise that issue before this Court.

the correctness of that holding,[10] we believe that petitioners' challenge does not merit this Court's review. The

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[10] The Tucker Act "does not create any substantive right enforceable against the United States for money damages." *United States* v. *Testan,* 424 U.S. 392, 398 (1976). See *United States* v. *Mitchell,* 463 U.S. 206, 216 (1983). The Act, instead, is a limited waiver of sovereign immunity for substantive rights "found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.' " *Mitchell,* 463 U.S. at 216 (quoting 28 U.S.C. 1491). See *Army & Air Force Exchange Service* v. *Sheehan,* 456 U.S. 728, 734 (1982). The "asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *Testan,* 424 U.S. at 400 (quoting *Eastport S.S. Corp.* v. *United States,* 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967)).

How those principles apply in this case depends on whether the required pay-mandating provisions must be the provisions creating the allegedly breached duty (here, the Fifth Amendment due process clause and 42 U.S.C. 2000d) or whether it is sufficient that the program-creating statute itself (here, the CSA statute) is pay-mandating. Even if the latter approach is correct (as the government has maintained in other cases), however, it remains unclear whether the CSA statute was pay-mandating in the sense required for the Tucker Act. Cf. *Bowen* v. *Massachusetts,* 108 S. Ct. 2722, 2738 n. 42 (1988) (questioning pay-mandating character of Medicaid statute). The Claims Court's jurisdiction over all three claims at issue is, accordingly, at least uncertain.

If the provisions creating the allgedly breached duty must themselves be pay-mandating, then the Claims Court was correct, because the due process clause and 42 U.S.C. 2000d do not mandate compensation by the federal government. As to the due process clause, see *Clark* v. *Library of Congress,* 750 F.2d 89, 103 n.31 (D.C. Cir. 1984) ("The courts have uniformly held that jurisdiction under the 'founded upon the constitution' grant of the Tucker Act is limited to claims under the 'takings clause' of the Fifth Amendment."); *Clemente* v. *United States,* 766 F.2d 1358, 1363 (9th Cir. 1985), cert. denied, 474 U.S. 1101 (1986); *Radin* v. *United States,* 699 F.2d 681, 685 n.8 (4th Cir. 1983); *Jaffee* v. *United States,* 663 F.2d 1226, 1230-1231 (3d Cir. 1981), cert. denied, 456 U.S. 972 (1982); *Duarte* v. *United States,* 532

jurisdictional ruling does not conflict with the decision of any other court of appeals[11] and raises no question of general importance. Moreover, the lower courts' rulings on the merits of petitioners' other claims effectively dispose of the three unreviewed claims, showing them to be insubstantial.

Thus, it is clear from the district court's statutory and constitutional due process rulings (App., *infra,* 7a-9a) and from the Claims Court's rulings on the statutory and breach-of-contract claims (Pet. App. A17-A21) that the petitioner CAAs had no property interest in funding past the end of FFY 1981. Their hope of receiving a second

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F.2d 850, 851-852 (2d Cir. 1976). As to 42 U.S.C. 2000d, the discussion at pages 14-15, *infra,* shows that the provision does not impose a compensation obligation on the federal government for its own discrimination independent of discrimination by a recipient of federal funds.

The Claims Court gave a different reason for its conclusion that it had no jurisdiction over the claim under 42 U.S.C. 2000d. It ruled that the district courts have exclusive jurisdiction over statutory race discrimination claims, pointing to 28 U.S.C. 1343. Pet. App. A23. That provision, however, which grants the district courts jurisdiction over certain statutory civil rights claims, does not declare such jurisdiction to be exclusive. Moreover, the decisions cited by the Claims Court (*ibid.*) ultimately rely on this Court's decision in *Brown* v. *GSA,* 425 U.S. 820 (1976), which holds only that *employment* discrimination claims against the federal government may be brought exclusively under the specific jurisdictional provisions of Section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16.

Whatever the correct conclusion about Claims Court jurisdiction over the statutory race discrimination claim, however, that claim, for reasons stated in the text, is wholly insubstantial.

[11] The Tenth Circuit's determination that this case fell within the exclusive jurisdiction of the Claims Court meant only that, if *any* court had jurisdiction to award monetary relief against the United States on the basis of petitioners' allegations, the Claims Court did. Thus, the Tenth Circuit decision does not conflict with the decision below.

grant payment from additional funds, just as it did not support a claim for denial of statutorily mandated due process, would not support a parallel claim of a Fifth Amendment due process violation. See *Richardson* v. *Belcher,* 404 U.S. 78, 80-81 (1971). Similarly, it is clear from the district court's APA and equal protection rulings (App., *infra,* 11a-16a) and from the Claims Court's APA rulings (Pet. App. A14-A17) that CSA's funding decisions were entirely rational (and not race-based). Hence, there is no need for further litigation of petitioners' equal protection claim. See *Bowen* v. *Gilliard,* 107 S. Ct. 3008, 3015 (1987).

Petitioner Rogers' claim of race discrimination under Section 601 (Title VI) of the Civil Rights Act of 1964, 42 U.S.C. 2000d, also is insubstantial. That provision declares: "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." Thus, the provision prohibits only the recipients of federal funds from discriminating; while the federal government might have to cut off funds from a recipient who is discriminating (42 U.S.C. 2000d-1), Section 601 does not impose any independent non-discrimination obligation on the federal government itself—where no recipient of federal funds is alleged to discriminate. See *Soberal-Perez* v. *Heckler,* 717 F.2d 36 (2d Cir. 1983), cert. denied, 466 U.S. 929 (1984); compare Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 (barring discrimination "under any program or activity receiving Federal financial assistance *or* under any program or activity conducted by any Executive agency or by the United States Postal Service" (emphasis added)). Here, Rogers' claim focuses only on the federal agency's allegedly discriminatory decision, in concluding its opera-

tions, to continue to differentiate between large and small CAAs instead of adopting a new *pro rata* method. The claim thus falls outside the scope of Section 601.

Rogers' Title VI claim is insubstantial for another reason as well. Rogers does not allege intentional discrimination.[12] Yet a majority of this Court has stated that discriminatory intent is required for a violation of 42 U.S.C. 2000d. See *Guardians Ass'n* v. *Civil Service Comm'n,* 463 U.S. 582, 610 (1983) (Powell, J., concurring in the judgment); *id.* at 612-613 (O'Connor, J., concurring in the judgment); *id.* at 639-642 (Stevens, J., dissenting). As noted, both the district court and the Claims Court found that CSA's funding decisions were supported by rational policies unrelated to race.

In short, the constitutional claims and the statutory racial discrimination claim have no foundation independent of those already addressed and rejected. In these circumstances, there is no reason for this Court to review the Claims Court's holding that it had no jurisdiction over those claims.[13] For the same reason, review is not warranted of petitioners' contention that, assuming that the

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[12] Petitioner Rogers "alleges that black people suffered disproportionately under the split funding policy" in that "[t]he practical effect of the policy of CSA was to allow rural community action agencies, which were generally small rural and white, to continue through the transition to the block grant funding program without any problems" whereas "urban agencies and large rural agencies having significant segments of the black population among their constituents and management staff were faced with a difficult situation." Pet. 17-18.

[13] We note, too, that one of the two CAA petitioners, EOF, did not appeal from the final judgment entered against it in the district court of Kansas (see notes 4, 5, *supra*) and that the claims of damages by petitioner SEK-CAP and its client petitioner Rogers are weakened by the fact that SEK-CAP obtained block grant funding for its program in FFY 1982 (see note 6, *supra*).

Claims Court lacked jurisdiction over the three claims, it should have transferred them to the district court under 28 U.S.C. 1631: it is not "in the interest of justice" (28 U.S.C. 1631) to transfer for additional litigation claims that are insubstantial and that have effectively been adjudicated under other rubrics. See *Zinger Constr. Co.* v. *United States,* 753 F.2d 1053, 1055 (Fed. Cir. 1985).[14] In sum, review of the Claims Court's dismissal of the equal protection, due process, and Title VI claims is not warranted.[15]

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[14] Relevant to the possibility of transfer is the question whether the district court in Kansas could hear any of the claims at issue. This Court recently held in *Bowen* v. *Massachusetts,* 108 S. Ct. at 2740, that a district court had jurisdiction to reverse the decision of the Secretary of Health and Human Services not to reimburse a State for its expenditures under the Medicaid program. Although the scope of the ruling is not clear, the case involved a claim under a statute that expressly commanded the payment of money in specified circumstances, in the context of a continuing financial relationship between the federal government and a State. In the present case, the claims at issue were made not under a pay-directing provision of the CSA statute itself, but under the Constitution and Title VI; moreover, there was no continuing financial relationship between CSA and the CAAs, because the CSA program was repealed as of the end of FFY 1981. Whether *Bowen* would support jurisdiction in the district court in Kansas is, accordingly, uncertain. In addition, it is by no means clear that the district court could today entertain a request for an injunction directing the payment of FFY 1981 funds that are no longer available. Cf. *Reeside* v. *Walker,* 52 U.S. (11 How.) 272, 290-291 (1850) (under U.S. Const., Art. I, § 9, Cl. 7, courts cannot order payment of funds unless appropriated by Congress for that purpose).

[15] If this Court were to conclude otherwise, we suggest that an appropriate disposition would be to vacate the decision of the Federal Circuit and remand the case with instructions to remand to the Claims Court for reconsideration of its jurisdictional determinations in light of our present filing and in light of this Court's decisions in *Christianson* v. *Colt Industries Operating Corp.,* 108 S. Ct. 2166 (1988), and *Bowen* v. *Massachusetts, supra.* In *Colt Industries,* the Court held, among other things, that where a case is transferred, law-of-the-case

2. Petitioners also ask this Court to review the lower courts' rejection of a number of their challenges on the merits. For the reasons given by the Claims Court, however (see pages 7-10, *supra*), those challenges were correctly rejected. Moreover, petitioners do not suggest that the rejection of their claims conflicts with any decision of this Court or of any other court. Finally, there is no continuing significance to the issues, as they concern the manner in which one federal agency, now long defunct, chose to wind up its affairs.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1989

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principles require that, "if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." 108 S. Ct. at 2179.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 81-4212

WALLACE ROGERS; SEK-CAP, INC., AND
ECONOMIC OPPORTUNITY FOUNDATION, PLAINTIFFS

v.

DWIGHT INK, DIRECTOR OF THE COMMUNITY SERVICES
ADMINISTRATION; AND DAVID STOCKMAN, DIRECTOR OF THE
OFFICE OF MANAGEMENT & BUDGET, ET AL., DEFENDANTS

[Filed Aug. 24, 1982]

MEMORANDUM AND ORDER

This is an action for declaratory, injunctive and other relief brought on behalf of the Southeast Kansas Community Action Program and the Economic Opportunity Foundation, Inc., two community action agencies, and by Wallace Rogers, who is a black, low-income resident of Pittsburg, Kansas, who participates and benefits from the programs operated by the Southeast Kansas Community Action Program. Plaintiffs seek to compel the Director of the Community Services Administration, and David Stockman, the Director of the Office of Management and Budget, to temporarily and permanently fund the operations of the Southeast Kansas Community Action Program and the Economic Opportunity Foundation.

Southeast Kansas Community Action Program is a non-profit corporation which was formed pursuant to § 210 of the Economic Opportunity Act of 1964. 42 U.S.C. § 2790. The Southeast Kansas Community Action Program serves Allen, Montgomery, Labette, Bourbon, Lynn, Crawford and Cherokee Counties in Kansas.

Plaintiff Economic Opportunity Foundation, Inc. is a non-profit corporation also organized pursuant to § 210 of the Economic Opportunity Act of 1964. The Economic Opportunity Foundation serves primarily Wyandotte County, Kansas. Both agencies allegedly serve the needs of the low-income populations of these counties. For the past several years, it is alleged these community action programs have received funding from the federal government.

Plaintiff Wallace Rogers is a 66-year old black man residing in Pittsburg, Kansas. He is alleged to be a low-income person who participates in the programs operated by the Southeast Community Action Program.

Defendant Dwight Ink is sued in his official capacity as Director of Community Services Administration. Defendant Ink is responsible for awarding and administering grants of money authorized under the Economic Opportunity Act. His responsibility is to administer all provisions of the Economic Opportunity Act as they relate to these plaintiffs.

Defendant David Stockman is sued in his official capacity as the Director of the Office of Management and Budget. Following the enactment of the Omnibus Reconciliation Act of 1981, David Stockman is the successor in authority to Dwight Ink as regards these funds and these community action agencies.

I

The Economic Opportunity Act of 1964 authorized the establishment of an agency within the federal government

called the Community Services Administration. The Community Services Administration administers the policies of the Economic Opportunity Act. Specifically, the Community Services Administration funds community action agencies which serve low-income citizens in an effort to help eradicate the causes of poverty. *See* 42 U.S.C. § 2790(a).

The Director of the Community Services Administration is authorized to designate community action agencies in communities in the United States, and to award these agencies grants for the purpose of carrying out community action programs. Funds are appropriated by Congress under § 221 of the Economic Opportunity Act of 1964. 42 U.S.C. § 2808.

On August 13, 1981, Congress enacted the Omnibus Budget Reconciliation Act of 1981, which effectively abolished the Community Services Administration and repealed 42 U.S.C. § 2808, under which community action programs had been funded since 1965. In place of direct federal funding of community service agencies, Congress has established a block grant program whereby federal money is granted to the states directly for their use in combating the causes of poverty.

Because the community service agency was abolished as of October 1, 1981, and because there were no more funds available to fund community action programs directly, plaintiffs will not be funded for the upcoming year. Plaintiffs seek an order of the court compelling defendants to fund their community action programs for next year, and to afford them certain rights they feel are theirs under the law. This matter is before the court on defendants' motion to dismiss.

On October 5, 1981, this Court, through the Honorable Richard D. Rogers, denied plaintiffs' motion for a temporary restraining order on the ground that plaintiffs

failed to demonstrate probable success on the merits. Judge Rogers concluded: "Plaintiffs have failed to demonstrate that the actions of defendants were probably arbitrary and capricious or in violation of the law." The court has considered the motion to dismiss, the arguments of counsel and the issues of law, and finds that defendants' motion to dismiss should be sustained.

II

This matter is before the court on a motion to dismiss. Both parties have elected to treat the motion to dismiss as one for summary judgment, in that both parties have included material outside the pleadings.

Plaintiffs argue that summary judgment is not proper in this case, and at this time, because there remain seven issues of fact to be litigated. The court finds that these are not issues of fact, but rather are conclusions of law. The court finds that there are no facts in dispute in this case, and that each of the conclusions of law proposed by plaintiffs must be decided in favor of defendants.

A. *Is this lawsuit premature?*

Congress has enacted the Omnibus Budget Reconciliation Act of 1981, which effectively abolishes the Community Services Administration as of October 1, 1981. Congress has decided to abolish the program under which community action programs are directly funded by the federal government. In place of direct funding, Congress has determined that the public would be better served by a block grant program. 42 U.S.C. § 9901. *See also,* 42 U.S.C. § 9912.

Under the new block grant program, the Secretary of Health and Human Services is authorized to make grants directly to the states. Each state will receive an annual

block grant to be used as it sees fit in its anti-poverty efforts. For fiscal year 1982, the states may choose to operate their anti-poverty programs under the block grant program, or to have the Secretary of Health and Human Services operate the community action programs under the pre-existing plan. Beginning in fiscal year 1983, and continuing into the future, all states are going to be required to operate under the block grant program.

The Governor of the State of Kansas has chosen to administer his state's anti-poverty program. This program is authorized to begin on October 1, 1981. As of that date, plaintiffs became eligible to receive funds pursuant to the block grant program. *See* 42 U.S.C. §§ 9902, 9904.

Because plaintiffs are eligible to receive money under the block grant program from the state of Kansas, they have not shown that they were directly harmed by the congressional decision to dissolve the Community Services Administration and to terminate direct funding under the Economic Opportunity Act of 1964. The court therefore finds that this lawsuit is premature and should be dismissed on that ground. Even were the suit not premature, plaintiffs must fail on the merits, however.

B. ***Have defendants' actions reduced the funding provided to the State of Kansas below the statutory minimum prescribed by 42 U.S.C. § 2812(a)?***

Section 2812(a), Title 42, United States Code, forbids the director of the Community Services Administration to reduce the total funding provided to any community action agency in any state below a certain minimum figure. In winding up the affairs of the Community Services Administration, the director in Washington has apparently determined that surplus funds available for Kansas community action agencies should be distributed in such a manner so as to fund completely four smaller community

action agencies, and to cut off the funding in part to the three larger community action agencies. Plaintiffs in this case are two of those three large community action agencies. Plaintiffs allege that the defendants' decision has reduced the total funding for the state below the minimum required in 42 U.S.C. § 2812(a).

The United States Congress has expressly repealed 42 U.S.C. § 2812(a). *See* 42 U.S.C. § 9912(a). This repeal became effective October 1, 1981. The Director's decision not to refund plaintiffs for fiscal year 1982 was a decision which became effective October 1, 1981. Therefore, when the Director's decision became effective, his decision was not in violation of the statutory provisions cited to this court by plaintiffs. The court does, therefore, overrule plaintiffs' objection to the motion to dismiss on this ground.

C. *Have defendants violated the statutory requirements of Rural-Urban Equity?*

In 42 U.S.C. § 2967, and again in § 2833(b), the Director of the Community Services Administration is required to distribute funds equitably between residents of rural and urban areas. Plaintiffs have reason to believe that defendants' decision to cut off funding to them may have violated these statutory requirements.

The court resolves this issue in a manner similar to the issue described just above. Sections 2967 and 2833, 42 U.S.C., were abolished by Congress and repealed effective October 1, 1981. *See* 42 U.S.C. § 9912(a). The Director's funding decision in regard to plaintiffs did not become effective until October 1, 1981, the same date upon which these statutes were repealed. Therefore, the Director's decision could not violate these statutes.

D. ***Plaintiffs' rights to due process.***

Plaintiffs argue that they have not been granted the due process hearing mandated by statutes and regulations and by the Constitution of the United States.

Before it was repealed by Congress, 42 U.S.C. § 2944(2) and 45 C.F.R. § 1067.2, required notice and opportunity to be heard before an application or refunding was denied. Plaintiffs argue that they were not refunded, and that no hearing was had before their refunding was denied. They also argue that their financial assistance was suspended without notice and opportunity to be heard.

The court finds no merit in either argument. Financial assistance to plaintiffs was neither suspended nor denied. Congress has instead decided to abolish the entire system. Therefore, the statutory and regulatory provisions cited to the court do not apply to this case. Even if they did, the regulatory scheme, by its own terms, does not apply in cases of reduced appropriations. 45 C.F.R. § 1067.2-.4. The decision by Congress to dismantle the entire Community Services Administration is certainly a reduction in appropriations. Therefore, plaintiffs had no statutory or regulatory right to a due process hearing.

Nevertheless, plaintiffs argue that they possess a right to a due process hearing under the Constitution of the United States. The United States Supreme Court has defined the kind of interest necessary to trigger constitutional guarantees of due process. Certain property interests are protected by procedural due process. To have a property interest in a government benefit, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it . . ." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972).

Plaintiffs can have no legitimate claim of entitlement to funds direct from the federal government during fiscal year 1982. Congress has chosen, effective October 1, 1981, to dismantle the entire Community Services Administration, and to stop funding directly community action agencies such as the plaintiffs. Therefore, if Congress has decided to stop funding plaintiffs, plaintiffs can have no legitimate claim of entitlement to those funds.

Plaintiffs claim, however, that they were entitled to be funded during fiscal year 1982 with funds left over from fiscal year 1981. The plaintiff agencies, in the past, were not funded from one fiscal year to another. Plaintiffs, rather, were funded on a program-year basis. A program year began in one fiscal year and ended in another fiscal year. Plaintiffs' last program year was funded by the director of this region. Plaintiffs allege that they were told they would be funded for their entire program year. That portion of plaintiffs' program year, which was in fiscal year 1981, was guaranteed to be funded through funds appropriated for fiscal year 1981. The remainder of the program year, which went through into fiscal year 1982, was "guaranteed" to be funded by fiscal year 1982 funds.

It is alleged that plaintiffs received their 1981 funding, but that the remainder of the funds for the program year, which were to come from fiscal 1982 funds, have been denied plaintiffs. Obviously, this denial is a direct result of the congressional decision to dismantle the Community Services Administration and to stop funding directly community action programs such as plaintiffs'. Plaintiffs allege that this "promise" or "understanding" between plaintiffs and the regional director give them a legitimate claim of entitlement to funding throughout the remainder of their program year.

Plaintiffs' claim of an informal agreement may indeed give rise to protected property interests. *Perry v. Sinder-*

mann, 408 U.S. 593 (1972). This would possibly be the case had plaintiffs' financial assistance been terminated. *MIL-KA-KO Research & Development Corp. v. Office of Economic Opportunity,* 352 F.Supp. 169, 173 (D. D.C. 1972). This is not the case, however, when Congress has chosen to dismantle the entire funding program. The dismantling of the Community Services Administration, and the decision not to directly fund community action agencies, is a disappointment of a "unilateral expectation" of a benefit, and is not entitled to the constitutionally required burden of procedural due process. Therefore, we find that there is no theory under which it may be held as a matter of law that plaintiffs' due process rights were violated.

E. ***Were defendants' actions an illegal impoundment of funds?***

It is alleged that defendants' refusal to use fiscal year 1981 funds for the purposes of funding plaintiffs' programs which continued into fiscal 1982 represents a violation of the United States Constitution, Article 2, § 3, and the Impoundment Control Act of 1974, 31 U.S.C. § 1400, *et seq.* Plaintiffs have apparently abandoned the contention they raised at the hearing on the temporary restraining order that § 682(e) of the Reconciliation Act which recalled unexpended funds constituted an unlawful impoundment of funds.

In the court's order of October 5, 1981, denying a temporary restraining order, Judge Rogers relied on § 682(e) of the Reconciliation Act and concluded that plaintiffs had failed to demonstrate the defendants had acted *ultra vires* by recalling unexpected funds. The court stands by that ruling. Section 682(e) authorizes the defendants to transfer certain balances if they were not expended.

Plaintiffs' lawsuit does not state a cause of action for violation of the Impoundment Control Act. The Im-

poundment Control Act of 1974 requires the executive branch of government to comply with certain reporting requirements before funds are impounded. Congress did not intend the act to create a claim upon which relief can be granted to individuals, corporations or organizations in cases where the executive has failed to report to Congress the withholding of funds.

Congress has expressly provided that lawsuits based on violations of the Impoundment Control Act must be brought by the Comptroller General. 31 U.S.C. § 1406. Even a lawsuit by the Comptroller General requires the tacit approval of Congress in each case. 31 U.S.C. § 1406.

Where a statute "limits a thing to be done in a particular mode, it includes the negative of any other mode." *Botany Mills v. United States,* 278 U.S. 282 (1929). In the Impoundment Control Act of 1974, Congress authorizes suits by the Comptroller General for violation of the act's provisions. The court finds that this provision negates the notion of a private cause of action. Where a statute, as here, provides a particular remedy, the court is extremely reluctant to imply the existence of other remedies. *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. 11 (1979).

The court is convinced that plaintiffs have no cause of action under the Impoundment Control Act of 1974, and the court concludes that dismissal of this part of plaintiffs' complaint is proper. *Public Citizen v. Stockman,* 528 F.Supp. 824, 828-30 (D. D.C. 1981); *Rocky Ford Housing Authority v. United States Department of Agriculture,* 427 F.Supp. 118, 134 (D. D.C. 1977).

F. ***Did defendants' actions violate their own regulations?***

Section 1067.30-5(8), 45 C.F.R., provides that "whenever possible the grantee's fundings will coincide with the

grantee's program year." Plaintiffs argue that the failure of the Community Services Administration to fund plaintiffs for their entire program year is a violation of the Community Service Administration's own regulations.

The court has examined this regulation in full, and finds that it only states a policy. The regulations state that whenever possible, the grantee's program year should be funded in its entirety. The regulation, however, does not speak in mandatory terms. The regulation does not require funding to coincide with the grantee's program year, and we hold that no cause of action exists against the Community Services Administration if a particular grantee's fundings do not coincide with their program year.

G. *Miscellaneous objections.*

Plaintiffs argue that defendants' actions violated the statutory requirement that funds be distributed on an equitable basis, the constitutional requirement of equal protection, the statutory requirement that funds be distributed on the basis of legitimate project concerns, and the ban in the Administrative Procedure Act of all arbitrary and capricious action.

Upon close examination, this multi-headed argument resolves itself into two main contentions. First, plaintiffs are arguing that they have been denied equal protection. Second, plaintiffs argue that defendants' decision represents an arbitrary and capricious decision or otherwise an abuse of discretion.

The federal government is bound by the Fifth Amendment to the Constitution of the United States to accord to its citizens equal protection of law. This equal protection requirement is at least as strong as that which applies to the states. *Bolling v. Sharpe,* 347 U.S. 497, 499 (1954). In addition, the Economic Opportunity Act of 1964 requires

the director to "assure that financial assistance under this subchapter will be distributed on an equitable basis in any community and within any state so that all significant segments of the low-income population are being served." 42 U.S.C. § 2836(8). Plaintiffs argue that defendants' decision has led to a distribution of funds which violate these requirements.

What has occurred in this case is that smaller community action agencies were funded for the fiscal year 1981 from 1981 funds. Plaintiffs were larger community action agencies. Plaintiffs were not funded on a fiscal-year basis, but rather on a program-year basis. Plaintiffs' program year began sometime in the middle of fiscal year 1981, and was scheduled to terminate sometime in the middle of fiscal year 1982. The procedure used with these large community action agencies was that the beginning of their program year was funded with funds appropriated during that fiscal year, and the end of their program year would be financed with funds appropriated for the next fiscal year. To illustrate, had the Community Services Administration not been dissolved by an act of Congress, plaintiffs would have been funded during their program year by receiving fiscal year 1981 funds for the first half of their program year and fiscal year 1982 funds for the second half of their program year.

Therefore, plaintiffs began their program year with the expectation of finishing their program year. However, Congress determined that the Community Services Administration, and its enabling legislation, should be repealed. Therefore, there would not be any fiscal year 1982 funds available for plaintiffs to use to finish their program year. There were, however, some funds remaining in the pipeline, so to speak. With these left-over or unexpended funds, the Director of the Community Services Administration, or his authorized agents, have determined

that some smaller community action agencies could be funded for an additional period of time in fiscal year 1982 with left over funds from fiscal year 1981. Plaintiffs, however, did not receive any additional funding from these unexpended 1981 funds. Plaintiffs allege that this constitutes a denial of equal protection. Plaintiffs would rather the regional director had pooled the available funds for a *pro rata* distribution to all of the community action agencies in Kansas.

While in the face of things it seems that a *pro rata* distribution would have been more fair than the procedure followed in this case, the court is unable to say that plaintiffs have been denied equal protection under the law. There is no evidence before the court that defendants' decisions were made without a rational basis.

Equal protection requires that government regulations and decisions be rationally supportable. *Dandridge v. Williams,* 397 U.S. 471, 483 (1970). The policy of distinguishing between large and small community action agencies has existed since 1975. Because community action agencies have different program years, the Community Services Administration has been able to stagger its workload in processing grant applications for those community action agencies which are funded on a program-year basis. Since 1974, the Community Services Administration has never had sufficient appropriations to be able to fund all community action agencies from the beginning of their year. Because the majority of community action agencies are "small" community action agencies whose funding is staggered based on a program year, the Community Services Administration has been able to process grant applications for most of them in advance of the end of the federal fiscal year, thus avoiding the accumulation of an unmanageable workload around September 30 and a resulting delay in funding.

The Community Services Administration did not alter their policy following Congress' decision to dissolve the administration. As of August 13, 1981, there was less than Thirty Million Dollars of unobligated funds from fiscal year 1981 remaining within the agency. Although this seems like a great amount of money, it represents approximately only eight percent of the Community Services Administration's fiscal year 1981 appropriation.

Most small community action agencies had already received funding for their full program year, which was to begin prior to August 13, 1981. Because the Community Services Administration was abolished as of October 1, 1981, and because it therefore has no appropriations for fiscal year 1982, no community action agency has received funding from fiscal 1982 funds.

The policy of the Community Services Administration since 1975 has been to divide grantee[]s who receive funds into two categories, large community action agencies and small community action agencies. Large community action agencies are those which receive more than Three Hundred Thousand Dollars annually; small community action agencies receive less than that amount. Large community action agencies generally receive funds in two installments; one installment would run from the beginning of that community action agency's program year until the end of the fiscal year on September 30, and another from the beginning of the next federal fiscal year on October 1 until the end of the community action agency's program year. This is called split-funding and results in large community action agencies having their program years funded from the appropriations for two separate federal fiscal years. By contrast, small community action agencies receive their funding in one yearly installment provided at the beginning of their program year and taken from one fiscal year's funds.

The Director of the Community Services Administration determined that it would be more equitable and less disruptive to fund all grantees according to their historical funding patterns. Of necessity, this means that the small community action agencies had received funding for their full program year which began prior to August 13, 1981, when the block grant program was enacted. To fully illuminate the distinction between small and large community action agencies, and to provide each community acction agency with an equitable *pro rata* share of fiscal year 1981 funds would have required the Community Services Administration to attempt to withdraw funds already committed to those community action agencies whose 1981 grant applications were approved and funded prior to August 13. The Director of the Community Services Administration made an administrative decision to commit the funds to the small community action agencies and to allow the funding for the larger community action agencies, like plaintiffs, to run out when the 1982 fiscal year began on October 1, 198[1]. This was strictly a judgment call, and we do not find it to be either irrational or inequitable. Because most of the community action agencies are small community action agencies, this policy enabled most community action agencies to receive twelve months of funding from fiscal year 1981 funds.

Similarly, we do not find defendants' actions to constitute arbitrary, capricious actions or an abuse of discretion, which we may scrutinize under the Administrative Procedure Act. 5 U.S.C. § 706(2)(a).

In applying the arbitrary and capricious standard of § 706(2)(a), the court must consider whether the decision was based on consideration of relevant factors and whether there has been a clear error of judgment. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974), *rehearing denied* 420 U.S. 956

(1975), *on remand* 399 F.Supp. 157 (W.D. Ark. 1975), *aff'd.* 425 U.S. 901 (1976). The court may set aside an agency action which is arbitrary and capricious or involves an abuse of discretion if the court is of the opinion that the agency action was clearly wrong. *Hughes Air Corp. v. Civil Aeronautics Board,* 482 F.2d 143 (9th Cir. 1973). The court must give great deference to decisions of an administrative agency, and may reverse such determinations only when they are clearly wrong. *Malis v. Hills,* 588 F.2d 545 (6th Cir. 1978). The court finds that defendants' decision did not constitute a clear error of judgment, and was not clearly wrong. The arbitrary and capricious standard of review does not require that the administrative agency's position be supported by substantial evidence, but only that it have a rational basis in law. *Hurley v. United States,* 575 F.2d 792, 794 (10th Cir. 1978). The court finds that defendants' decisions do indeed have a rational basis in law.

III

Therefore, the court finds that defendants' motion to dismiss should be sustained. Inasmuch as it appears from the record that plaintiffs are no longer represented by counsel, the court will direct the clerk of this court to forward a copy of this Memorandum and Order directly to plaintiff Wallace Rogers, 1011 South Elm, Pittsburg, Kansas, and to the two organizational plaintiffs if their address can be discovered.

IT IS BY THE COURT THEREFORE ORDERED that defendants' motion to dismiss is hereby granted. IT IS FURTHER ORDERED that a copy of this Memorandum and Order be forwarded individually to each plaintiff in this action, and copies to counsel for defendants.

DATED: This 24th day of August, 1982, at Kansas City, Kansas.

/s/ Dale E. Saffel

DALE E. SAFFEL
United States District Judge

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